S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2006
v	No. 257867 Leelanau Circuit Court
JOHN RUDY VIDERGAR, Defendant-Appellant.	LC No. 04-001391-FH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while intoxicated causing serious impairment of a body function, MCL 257.625(5). He was sentenced to five years' probation with three months in jail. He appeals as of right, and we affirm

Defendant first argues that the trial court erred in ordering the victim's treating physician to testify. Whether evidence is barred by the doctor-patient privilege statute is a question of law that we review de novo. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). Further, whether a party has standing is a question of law and is also reviewed de novo. *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 177; 702 NW2d 588 (2005).

Defendant claims that he has standing to raise the privilege issue because standing requirements apply to Fifth Amendment rights and do not apply to this statutory right, which is created by MCL 600.2157. However, Michigan applies standing requirements to statutory rights, and "[a]s a general rule, criminal defendants do not have standing to assert the rights of third parties." *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994). More specifically, the patient-physician privilege belongs to the patient and cannot be invoked by a third party to bar evidence. *Samson v Saginaw Professional Bldg Inc*, 44 Mich App 658, 670; 205 NW2d 833 (1973).

Here, defendant's wife never asserted the privilege. Initially, defendant objected to the doctor's testimony on the basis that although he was listed on defendant's witness list, he was not listed on the prosecution's. The court overruled this objection. Before the doctor testified, the prosecutor notified the court that because the doctor had no written waiver of the statutory privilege by the patient, he would not testify unless ordered to do so by the court. The court twice stated that the patient/wife had not asserted the privilege and further stated that even if she had, he would order the doctor to testify. Neither defendant, nor his wife, who was in the

courtroom, asserted in response that the privilege had in fact been, or was then being, asserted. In a motion for new trial, and on appeal, defendant submitted the affidavit of his wife, attesting that because defendant's attorney did not want the doctor to testify, she was prepared to assert the privilege, but she did not do so because the court stated that it would overrule any such claim. We find this belated assertion to be insufficient to support any right of defendant to assert his wife's privilege.

Defendant next argues that defense counsel was required to object to the doctor's testimony, and his failure to do so constituted ineffective assistance of counsel. We disagree. Defendant had no standing to challenge the doctor's testimony where his wife had not asserted the privilege.

Finally, defendant argues that the evidence was insufficient to prove that the victim suffered serious impairment of a body function and that defendant's intoxication was a substantial cause of the injury. We disagree. We review a sufficiency of evidence claim de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, would justify a rational trier of fact in finding that all the elements were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Defendant first claims that the plain language of MCL 257.58c provides that a serious impairment of a body function under MCL 257.625(5) must be either permanent or at least long lasting.[1] However, in *People v Thomas*, 263 Mich App 70, 74-75, 77; 687 NW2d 598 (2004), this Court held that an injury under MCL 257.58c need not be a permanent injury to qualify as a "serious impairment of a body function."

In this regard, defendant claims that the Legislature intended a "serious impairment of a body function" under MCL 257.58c to be a permanent injury because MCL 257.602a provides that a "serious injury" is "a physical injury that is not necessarily permanent," and MCL 257.58c does not so provide. However, MCL 257.602a uses different language. MCL 257.602a purports to define the term "serious injury."

Moreover, the treating physician testified that he considered the victim's pulmonary contusion to be a serious impairment of a body function, and it is undisputed that the victim also suffered broken ribs and a spinal column injury, and spent ten days in intensive care followed by five additional days of hospitalization. We conclude that the evidence was sufficient under *Thomas, supra.*

Finally, defendant next argues that the evidence was insufficient to establish that defendant's intoxication was a substantial cause of the injury, citing *People v Lardie*, 452 Mich 231, 259, 267; 551 NW2d 656 (1996). However, our Supreme Court overruled *Lardie* in *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005). *Schaefer* held that:

[1] Because the current version of MCL 257.625(5) does not contain a definition of "serious impairment of body function" and did not at the time of the injury, both sides agree that the definition provided in MCL 257.58c applies per MCL 257.1.

> The plain text of § 625(4) requires no causal link between the defendant's intoxication and the victim's death. . . . Accordingly, it is the defendant's *operation* of the motor vehicle that must cause the victim's death, not the defendant's "intoxication." While a defendant's status as "intoxicated" is certainly an element of the offense of OUIL causing death, it is not a component of the *causation* element of the offense. [473 Mich at 431. Emphasis in original].

Although the *Schaefer* Court considered MCL 257.625(4) instead of subsection (5), the ruling is applicable to subsection (5) because the critical causation language of subsection (4) and (5) is identical.[2] Thus, the court's plain-language analysis of subsection (4) must similarly apply to subsection (5), because "[i]dentical language should certainly receive identical construction when found in the same act." *Empire Iron v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997) (citations omitted). Also, defendant's substantial-cause argument is supported only by *Lardie*, *supra*, and its progeny.

Applying the *Schaefer* test, we hold that the jury was presented with sufficient evidence to find that that defendant's *operation* of the vehicle caused the injury. The jury heard testimony that excessive speed caused the accident and that defendant's blood-alcohol level was three and a half times the legal limit. From this, a rational trier of fact could properly infer that defendant's operation of the vehicle caused the injury. *People v Hardiman*, 466 Mich 417, 424-425; 646 NW2d 158 (2002). Defendant emphasizes that the police department did not send an accident reconstructionist to rule out other possible causes. However, defendant presented no evidence of other potential causes. Instead, *defense counsel* tried to characterize a photo of the vehicle taken after the accident as showing that a strut or spring may have been broken, implying that the accident might have been unavoidable. Even assuming the photo established that the vehicle was mechanically damaged, that alone would not establish that the damage must have occurred before the accident. Thus, the jury was free to disregard defense counsel's characterization of the evidence. Moreover, the prosecution is not required to disprove every reasonable theory consistent with innocence, but is only required to prove the elements of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

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[2] Subsection (4) provides in pertinent part: "A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows: . . . ." Subsection (5) likewise provides: "A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony."